



SJR 32 Subcommittee on Medical Liability Insurance

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58th Montana Legislature

SENATE MEMBERS

DUANE GRIMES--Vice Chair
JOHN COBB
BRENT CROMLEY
DEBBIE SHEA

HOUSE MEMBERS

GEORGE GOLIE--Chair
ROY BROWN
KATHLEEN GALVIN-HALCRO
DON ROBERTS

COMMITTEE STAFF

JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary
DAVE BOHYER, Research Director

MINUTES

June 24, 2004

Room 137, State Capitol
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

REP. GEORGE GOLIE, Chair
SEN. DUANE GRIMES, Vice Chair

SEN. JOHN COBB
SEN. BRENT CROMLEY
SEN. DEBBIE SHEA

REP. ROY BROWN

COMMITTEE MEMBERS EXCUSED

REP. KATHLEEN GALVIN-HALCRO
REP. DON ROBERTS

STAFF PRESENT

DAVE BOHYER, Research Director
JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary

AGENDA & VISITORS' LIST

Agenda, Attachment #1.
Visitors' list, Attachment #2.

COMMITTEE ACTION

The SJR 32 Subcommittee approved the March 25, 2004, minutes as written. The Subcommittee also approved the following bill proposals to be drafted for Legislative Council review:

- LC 5001 W, as amended;
- LC 5002 W, as amended;
- LC 5004 W;
- LC 5005 W, as amended;
- LC 5007 W, as amended;
- LC 5008 W, as amended;
- LC 5009 W; and
- LC 5000W, as amended.

CALL TO ORDER AND ROLL CALL

REP. GOLIE called the meeting to order at 8:06 a.m. REP. GOLIE explained the process (Attachment #1) through which the Subcommittee would review, discuss, and take action on each of the 10 proposed draft bills.

The secretary noted the roll (Attachment #3), Rep. Roberts and Rep. Galvin-Halcro were excused. REP. GOLIE noted that Rep. Galvin-Halcro had given her proxy to him and REP. BROWN noted that Rep. Roberts had placed his proxy Rep. Brown.

The minutes from the March 25, 2004, meeting were approved as written on a unanimous voice vote.

SUBCOMMITTEE EXECUTIVE WORK SESSION

LC 5001W - REVISE "OSTENSIBLE AGENCY" REGARDING MEDICAL LIABILITY -- EXHIBIT #1

John MacMaster, Staff Attorney, Legislative Services Division (LSD), explained the revisions contained in the bill draft proposal (see EXHIBIT #1).

Stakeholder Comments

Al Smith, Montana Trial Lawyers Association (MTLA), distributed a memo from the MTLA outlining the MTLA's comments on each of the 10 proposed bill drafts (EXHIBIT #2). He then addressed the MTLA position regarding the issue of ostensible agency. Mr. Smith proposed an amendment to the bill draft on Page 1, Line 23 (EXHIBIT #3), and explained the MTLA rationale for the amendment.

Mona Jamison, The Doctor's Company (TDC), testified that TDC was pleased to see an ostensible agency bill. Ms. Jamison noted that TDC would prefer to have the word "claimed" (EXHIBIT #1, Page 1, Line 21) clarified to reflect who is making the claim. REP. GOLIE said the Subcommittee would attempt to clarify the wording later in the process if the Subcommittee approved drafting the bill proposal.

John Flink, Montana Hospital Association (MHA), said the MHA would support the bill draft with one minor change on Page 1, Line 12 (EXHIBIT #4).

SEN. COBB moved to draft LC 5001W (EXHIBIT #1).

SEN. COBB asked Mr. MacMaster to give his opinion on whether the word "claimed", as discussed by Ms. Jamison, needed to be clarified in the bill draft. Mr. MacMaster said making the change, i.e. replacing "claimed" with "alleged", would not change the intent of the bill.

SEN. COBB moved to strike "claimed" and insert the word "alleged" on Line 21 on Page 1 of LC 5001W (EXHIBIT #1). The motion to amend LC 5001W passed on a unanimous voice vote.

REP. GOLIE read the MTLA/SMITH amendment (EXHIBIT #3 - "a healthcare provider may not be relieved of liability under subsection (2) unless the health care provider has assured that a person or entity claimed to be an ostensible agent of the health care provider has a minimum of one million dollars malpractice liability insurance coverage"). **REP. GOLIE moved to approve the amendment.**

SEN. SHEA predicted problems with the language as well as the intent of the amendment and suggested making the amendment a separate bill.

SEN. GRIMES asked REP. GOLIE to explain his amendment. REP. GOLIE explained it by saying that the ostensible agent or person who is not an employee of a healthcare facility has to have \$1 million of medical malpractice insurance coverage.

Pat Melby, Montana Medical Association (MMA), said most hospitals by-laws already require medical staff to carry \$1 million to \$3 million in coverage. He agreed with the points raised by Ms. Jamison, saying there was not a problem with the concept of the bill, just the language.

Tom Ebzery, St. Vincent Healthcare, Billings, also concurred with Ms. Jamison's and Mr. Melby's opinions regarding the language. He raised an additional concern over language in the amendment, saying that he would be more comfortable with the language if the words "has assured" were changed to "required" to make the wording more clear and concise.

Al Smith, MTLA, said concerns regarding the language of the amendment may be lessened if the word "claimed" was changed to "alleged", as was done in the original bill draft in subsection (2) (EXHIBIT #1). He also supported changing the language from "has assured" to "required".

Mr. Melby also supported changing the language in the amendment to match the amended language in LC 5001W.

SEN. GRIMES thought the amendment would make LC 5001W unwieldy and convoluted, and said he opposed it. He thought LC 5001W would accomplish its intended purpose as written.

REP. GOLIE withdrew his amendment.

SEN. CROMLEY moved to amend Mr. Smith's MTLA amendment (EXHIBIT #3) by striking "has assured" and inserting "requires"; and striking "claimed" and inserting "alleged".

REP. BROWN commented that the proposed changes did clarify the language but questioned how a hospital could dictate an insurance level to a doctor not employed by the hospital. He said that making the link stronger between the hospital and the doctor was what the Subcommittee was trying to get away from.

Mr. MacMaster agreed with REP. BROWN and said he didn't see how the amendment could work. He said, "you can't require someone to have insurance if you don't have control over them".

SEN. CROMLEY said this bill addresses healthcare providers who work in a hospital but are not employed by that hospital. To a patient coming in, the healthcare provider looks like an employee and unless told otherwise, the patient would not know that the healthcare provider is an independent agent. In order to relieve the hospital of liability, this amendment would make sure that the patient still has an avenue of redress.

SEN. COBB said it appeared to him as if the bill would allow for the hospital to be held not liable if the agent had enough money.

Dick Brown, MHA, clarified that, regarding medical staff at a hospital, privileges must be approved to provide care at a hospital, and part of being privileged is to have liability insurance coverage. As Mr. Melby stated, most by-laws for medical staff require at least \$1 million coverage. Whether employed or not, to be privileged at a hospital, one of the criteria would be to have liability insurance.

Ms. Jamison, TDC, said TDC totally supports the ostensible agent bill but pointed out that while this bill was intended to help hospitals, there is no mention of the word "hospital" in the bill. She said she was concerned because the full consequences of the language are unknown.

Al Smith, MTLA, said the amendment of doesn't automatically mean that the hospital is going to be liable. It is in keeping with current practices, which is requiring that persons with privileges at hospitals would still have that coverage.

SEN. CROMLEY's motion to amend the language in EXHIBIT #3 (striking "has assured" and inserting "requires" and striking "claimed" and inserting "alleged" failed 5 - 3, with SEN. COBB, SEN. GRIMES, SEN. SHEA, REP. BROWN, and REP. ROBERTS voting no (Attachment #4).

SEN. COBB moved to pass LC 5001W, as amended. The motion passed 7-1, with SEN. CROMLEY voting no (Attachment #5).

LC 5002W - REVISE PAYMENT OF LOST WAGES/MEDICAL EXPENSES PRIOR TO DETERMINING LIABILITY -- EXHIBIT #5

Mr. MacMaster explained the concepts contained in the LC 5002W bill draft (EXHIBIT #5).

Pat Melby, MMA, distributed proposed amendments to LC 5002W (EXHIBIT #6) and said the MMA supports the bill draft and would like to see it considered by the full legislature. He explained that the amendments (EXHIBIT #6) would change the language in the title on Page 1, Lines 2 and 5 of LC 5002W; and would also change the language on Page 3, Lines 14 and 17.

Al Smith, MTLA, strongly opposed the amendments proposed by Mr. Melby/MMA. He said LC 5002W sets up an absolute immunity under these statutes just for medical malpractice insurers (lines 14-18 on page 3). The requirement under the Ridley decision (Ridley v. Guaranty Nat. Ins. Co., 286 Mont. 325) is that, in a case where liability is reasonably clear, the insurer has an obligation to make advance payment of medical costs and lost wages prior to a settlement or final judgment in the underlying action. There could be a situation where there is an egregious mistake that is "reasonably clear" and that violates the standard of care, and where liability is reasonably clear. The insurer should be required to make those advance payments for the necessary medical care needed by the patient. MTLA can't support a blanket exemption for medical malpractice insurers. They should have to meet the same standards as every other insurer.

Mona Jamison, TDC, said TDC supports LC 5002W (EXHIBIT #5) and the proposed amendments (EXHIBIT #6). In response to Mr. Smith's comments, Ms. Jamison said advance payments in cases where liability is reasonably clear was a rule of law established by the Montana Supreme Court, as it applied to automobile accident cases. This bill is an attempt to prevent the Supreme Court from extending that ruling to medical malpractice cases.

Larry Riley, Garlington Law Firm, Missoula, Utah Medical Insurance Association (UMIA), agreed with Ms. Jamison's statements. Mr. Riley related a case he had handled for UMIA and said medicine is infinitely more complex than automobile cases. It is easy to establish reasonably clear liability in most automobile cases. It is extremely difficult to establish in medical malpractice liability cases.

SEN. GRIMES moved to draft LC 5002W (EXHIBIT #5) and the amendments as proposed by the MMA (EXHIBIT #6).

SEN. COBB asked Mr. MacMaster for his legal opinion on the MMA amendments (EXHIBIT #6). Mr. MacMaster said the first and third amendments could be adopted without hurting the bill. Regarding the fourth amendment, Mr. MacMaster said the bill was designed to counteract the Ridley decision, and adoption of the amendment would take that out.

SEN. COBB said he would prefer that the second and fourth MMA amendments not be done at this time.

SEN. GRIMES withdrew his motion and made a new motion to draft only the first and third MMA amendments (EXHIBIT #6). The motion passed on a 6-2 vote, with REP. GALVIN-HALCRO and REP. GOLIE voting no (Attachment #6).

SEN. GRIMES moved to pass LC 5002W, as amended.

SEN. CROMLEY said as he understands it, the Ridley decision is limited to auto liability insurance which is compulsory by statute.

Mr. Melby said the Ridley case is very clearly based on the mandatory requirements to have automobile insurance and the initial reading of it indicates that it is limited to automobile insurance. Former Supreme Court Justice Trieweller, however, said "anybody out there that thinks this is limited to automobile insurance is kidding themselves". Consequently, the only thing that plaintiff and defense attorneys can think when they are dealing with such a case is that the Ridley case does apply in all insurance.

SEN. CROMLEY said the Ridley decision should not be extended to noncompulsory insurance and thought that LC 5002W reaches into a larger area that the Subcommittee was not designed to address.

SEN. GRIMES said this has a tremendous amount to do with potential alleviation of some of the costs associated with medical malpractice underwriters and said it was reasonable for the Subcommittee to move forward with this issue.

REP. GOLIE said he would not support LC 5002W because is bad for both victims and consumers.

SEN. GRIMES' motion to draft LC 5002W, as amended, passed on a 5-3 vote, with SEN. SHEA, REP. GALVIN-HALCRO, and REP. GOLIE voting no (Attachment #7).

LC 5003W - ELIMINATE ABILITY OF THIRD-PARTY CLAIMANT TO BRING AN ACTION FOR BAD FAITH IN CONNECTION WITH MEDICAL LIABILITY -- EXHIBIT #7

Mr. MacMaster discussed LC 5003W, saying it provides that a third party claimant cannot bring an action for bad faith in connection with the handling of a medical malpractice insurance claim.

Al Smith, MTLA, referred to Pages 5 & 6 of the MTLA memo (EXHIBIT #2) distributed to members earlier, and said the MTLA opposes LC 5003W as drafted. This statute applies to insurance companies, not doctors or hospitals. Malpractice insurers should have to adhere to the same standards as any other insurer.

Pat Melby said MMA supports LC 5003W and is responsible for bringing this problem to the attention of the SJR 32 Subcommittee. It allows the injured person who doesn't have a contractual relationship with the insurance company to bypass the person who is alleged to have injured them, and sue the insurance company directly. This bill conforms Montana law, at least in relation to medical malpractice, to the law in most states.

SEN. GRIMES moved to draft LC 5003W (EXHIBIT #7).

Mr. MacMaster said the bill likely would not cover common law bad faith claims.

SEN. CROMLEY thought LC 5003W was a potentially dangerous bill and would basically allow that, in the State of Montana, insurance companies in medical malpractice actions do not have to act in good faith. He said he was extremely opposed to the bill.

SEN. GRIMES withdrew his motion and moved to suspend action on LC 5003W.

REP. GOLIE did not agree to suspend action on the bill.

SEN. GRIMES again moved to draft LC 5003W and said if it wasn't for the plaintiff-attorney-driven Supreme Court that Montana has, this bill would not be necessary.

REP. GOLIE asked Mr. Melby if bad faith claims are a problem in Montana. Mr. Melby said in his opinion, they are. Mr. Riley agreed, but said the impact could be lessened if some of the other proposed bill drafts pass.

REP. GOLIE asked if the LC 5003W would give the victim power. Al Smith, MTLA, said the injured party would have no leverage under LC 5003W.

SEN. GRIMES withdrew his motion to draft LC 5003W, and reserved the right to bring it back for reconsideration later in the meeting.

LC 5004W - REVISE "CAPTAIN OF THE SHIP" DOCTRINE WITH RESPECT TO MEDICAL LIABILITY -- EXHIBIT #8

Mr. MacMaster said LC 5004W (EXHIBIT #8) was drafted in response to a Supreme Court ruling involving the Captain of The Ship doctrine and says that in a medical malpractice claim, a healthcare provider is not liable for an act or omission by a person or entity that was not an employer, agent, or otherwise under the control of the healthcare provider at the time that the act or omission occurred.

Pat Melby, MMA, spoke in support of LC 5004W. On behalf of the MHA, he proposed two minor amendments to LC 5004W (EXHIBIT #8): on Line 4 of the title - insert "actual" between "the" and "control" and on Line 15 - insert "actual" between "the" and "control". Mr. Melby said the MMA did not object to these amendments and would support the changes.

Tom Ebzery, St. Vincent Healthcare, Billings, also spoke in support of LC 5004W, including the proposed amendments from the MHA, and urged the Subcommittee to approve drafting.

Al Smith, MTLA, spoke in support of the bill but questioned the need for inserting "actual" into the bill draft.

SEN. GRIMES asked Mr. MacMaster to give a legal opinion on inserting "actual" into the bill draft. Mr. MacMaster didn't think adding "actual" strengthened the bill.

Larry Riley, UMIA, agreed with Mr. MacMaster that the word "actual" is not needed, and said the statute is better written without it.

SEN. COBB moved to draft LC 5004W (EXHIBIT #8), as written. The motion passed on a unanimous vote (Attachment #8).

LC 5005W - REVISE "LOSS OF CHANCE" DOCTRINE WITH RESPECT TO MEDICAL LIABILITY -- EXHIBIT #9

Mr. MacMaster explained that the concept of the bill is to allow a patient to receive damages for something a doctor did that reduced the patient's chances of recovery. He noted that he did not use the terminology "loss of chance of recovery" in the bill, but instead, used "reducing a patient's chance of recovering" because that is the terminology used by other states with loss of chance doctrine. Mr. MacMaster said subsection (3) contains the "50% rule", as discussed in the March meeting, and as requested by the MTLA. The "50% rule" allows that if the patient's chance of recovery before the act or omission by the doctor was 50% or better, the patient will get full damages. If, before the act or omission by the doctor, the chance of recovery was less than 50%; then the chance of recovery after the act or omission is compared to the chance of recovery before the act or omission and the percentage difference is multiplied by the damages, and that amount is what is awarded for damages. There are several other 50% rules that are used by other states, and some states don't have a loss of chance or reduced chance of recovery statute. Mr. MacMaster said he investigated all of the rules in all of the states and used them to put together the best language possible.

Pat Melby, MMA, proposed amendments (EXHIBIT #10) to LC 5005W (EXHIBIT #9). The proposed amendment strikes "(a)" on Page 2, line 1, through "damages" on line 7, and inserts "damages". The MMA would like the 50% rule removed from LC 5005W and will not support the bill if it is not removed.

Al Smith, MTLA, proposed an amendment (EXHIBIT #11) to LC 5005W (EXHIBIT #9). The proposed amendment, on Page 1, line 11, would insert "diagnosis or" following "or omission during". Mr. Smith said most loss of chance cases occur in cases about diagnosis, and is especially true in cases with good empirical evidence about survivability. Regarding the 50% rule, Mr. Smith explained that in civil cases, the plaintiff has to prove by a preponderance of the evidence, that more likely than not, the doctor was negligent and that the damages resulted from the doctor's negligence. What this rule says, is that in a case where only 51% of damages can be proven, the patient would still get all the damages.

Larry Riley, UMIA, said the patient should be compensated for whatever loss he or she suffered, regardless of what the percentage is. If the 50% rule is taken out, LC 5005W becomes equitable for everyone.

SEN. COBB moved to draft LC 5005W.

SEN. COBB asked Mr. MacMaster for his opinion on the inclusion of Mr. Smith's amendment (EXHIBIT #11). Mr. MacMaster thought it was a good amendment.

SEN. COBB moved to adopt Mr. Smith's amendment (EXHIBIT #11) into LC 5005W.

SEN. GRIMES said he did not support the Smith amendment and questioned the bill overall. He said it jeopardized a healthcare provider's ability to discuss anything in a professional setting, because anything said could possibly be considered a diagnosis.

REP. GOLIE asked Mr. Smith to explain his rationale for inserting "diagnosis" in line 11. Mr. Smith said it would clarify that the law would apply to diagnosis and treatment, not just treatment alone. He said the terminology "diagnosis or treatment" is commonly used in other bills.

SEN. COBB's motion to adopt Mr. Smith's amendments (EXHIBIT #11) to LC 5005W passed on a 5-3 vote, with SEN. GRIMES, REP. BROWN, and REP. ROBERTS voting no (Attachment #9).

REP. BROWN moved to adopt Mr. Melby's/MMA amendment (EXHIBIT #10) into LC 5005W.

REP. GOLIE asked Mr. Smith to explain who decides the percentage for damages from a trial or lawsuit. Mr. Smith said expert witness testimony would influence the decision but that ultimately, the final decision is made by a jury or a judge.

REP. BROWN's motion to adopt the Melby/MMA amendment (EXHIBIT #10) failed on a 4-4 vote, with SEN. CROMLEY, SEN. SHEA, REP. GALVIN-HALCRO, and REP. GOLIE voting no (Attachment #10).

SEN. COBB moved to draft LC 5005W, as amended.

Mr. MacMaster said the bill is designed to codify and establish some concrete rules for what is already law in Montana: if a doctor commits an act of malpractice, and if that act is at least a contributing factor to some type of damage to the patient which reduces the patient's chance of recovery; then the patient will get damages from that.

SEN. GRIMES expressed doubt that LC 5005W would be effective in Montana and suggested tabling it until additional research can be done. He said he was very opposed to the bill because the issue of proportionality has not been adequately addressed, which was the reason for the bill in the first place.

REP. BROWN said he understood that SEN. COBB's intention in moving that the draft be approved, but thought sending the bill forward for drafting may signify approval of the content. He said he intended to vote against the motion to approve the bill for drafting.

SEN. CROMLEY said he was not completely clear on what current law is on this issue and asked Mr. MacMaster to explain. Mr. MacMaster said there is only one Montana Supreme Court ruling on this issue, which states that a plaintiff can get damages for loss of chance of recovery but does not go into any detail. Mr. MacMaster commented that LC 5005W was a very time-consuming and complex bill to draft and that this is an area of law that perhaps would be best left to the Courts to decide.

SEN. SHEA agreed LC 5005W is a complex bill but thought it should be moved forward to the Legislative Council. She said the SJR 32 Subcommittee can preface it with the fact that the Subcommittee wants it to go forward, despite the fact that it still needs a lot of work.

SEN. COBB asked Mr. Riley to respond to the concerns expressed by the Subcommittee members. Mr. Riley cited an example of a patient with overall damages of \$1 million but with 5% loss of chance damages. The way the law applies right now would allow the patient to recover 100% of his overall damages. The fairest approach would be to compensate for the loss suffered. Everyone is treated equally that way.

SEN. SHEA asked Ms. Jamison, TDC, to respond to Mr. Riley's comments. Ms. Jamison stated that TDC is concerned that LC 5005W will actually drive premiums up and eliminates all of the idea of proportionality.

Mr. MacMaster said that at the March meeting, the Subcommittee voted to have this issue continue on and staff was told to include the "50% rule". He said he found, in the process of researching this issue, that there are many different versions of the "50% rule". Mr. MacMaster said the only person at the March meeting who spoke to the 50% rule was Mr. Smith, so he used Mr. Smith's version of the rule for LC 5005W.

SEN. GRIMES said he opposed LC 5005W and said he thought there would be an independent bill coming forth on this issue using Mr. Mac Master's extensive research. As a sponsor of SJR 32, he asked the Subcommittee to eliminate LC 5005W.

SEN. SHEA said she didn't want to see this proposal voted down. She wondered if REP. BROWN's motion to adopt the MMA amendment could be revisited and then move the bill forward. SEN. SHEA said she had assumed this bill was a result of consensus among those who worked together to draft it.

REP. GOLIE said he supported the bill, that it provides a good starting point and could be amended in the process.

Larry Riley, UMIA, asked to clarify his role in this proposal. He explained that he had advised the Subcommittee at the March 25, 2004, meeting, that he had been in contact with representatives of the plaintiff's bar who were interested in working out a consensus. Only one meeting was held and after several attempts to get input from the plaintiff's representatives, there has been no input received from them; so this proposal is not the result of consensus.

SEN. SHEA made a substitute motion to reconsider action on the Melby amendment (EXHIBIT #10). The substitute motion to reconsider passed on a 5-3 vote, with SEN. CROMLEY, REP. GALVIN-HALCRO, and REP. GOLIE voting no (Attachment #11).

SEN. SHEA moved to adopt the Melby amendment (EXHIBIT #10). The motion passed on a 5-3 vote, with SEN. CROMLEY, REP. GALVIN-HALCRO, AND REP. GOLIE voting no (Attachment #12).

SEN. COBB moved to adopt LC 5005W, as amended. The motion passed on a 5-3 vote, with SEN. CROMLEY, REP. GALVIN-HALCRO and REP. GOLIE voting no (Attachment #13).

LC 5006W - REVISE THE PURPOSES AND PROCESSES OF THE MONTANA MEDICAL LEGAL PANEL -- EXHIBIT #12

Mr. MacMaster said he had been told that this bill would not pass and asked if the Subcommittee wished to proceed with an explanation and discussion. REP. GOLIE said he liked LC 5006W and asked Mr. MacMaster to proceed with his explanation. Mr. MacMaster said the bill's premise came from Mr. Ebzery and makes a number of changes in the Medical Malpractice Legal Panel Act (MMLP). He noted several of the major changes:

- the claimant will be responsible for paying half the cost of processing a claim and will pay at the time his claim is processed by the MMLP;
- the Panel will be required to keep a record of the hearing by electronic device or stenographic notes; and
- the record is documentary evidence submitted before the Panel and will be admissible in court, if the claimant goes to court.

Mr. MacMaster said these changes would drastically increase the length that the average Panel would have to spend on a case and that the current time limits for hearing a case would have to be expanded. Currently, the hearing has to happen within 120 days after the claim. LC 5006W has the time limit set at 6 months but that can be changed. The bill draft proposal also provides that, although the record of documentary evidence before the Panel is admissible in court, it also has to comply with all other applicable rules of evidence.

Pat Melby, MMA, said there has been a lot of discussion among the medical professionals, associations, and insurance companies. He said a meeting had been held in the last week which was attended by 75 physicians and that one of the major issues discussed was the MMLP. It was a unanimous decision from that discussion that there may be some things that can be done to tweak the Panel but at this point, there isn't a lot of desire to make major changes. The physicians do not want this bill to go forward.

Larry Riley, UMIA, also attended that meeting and said LC 5006W would in effect, kill the MMLP, turning a quick, economical, and confidential screening panel that does good work into a trial. He also felt it was unreasonable to ask claimants to pay half the costs.

Al Smith, MTLA, agreed with both Mr. Riley and Mr. Melby. He said it would negate everything the MMLP stands for and that the Panel would become unconstitutional because the changes would be basically setting up a second court level for medical malpractice plaintiffs that no other civil litigants have to go through. The whole concept of the Panel would likely be successfully challenged if LC 5006W is passed.

SEN. GRIMES moved LC 5006W do not pass. The motion passed on a 8-0 unanimous vote (Attachment #14).

LC 5007W - MAKING EXPRESSIONS OF SYMPATHY INADMISSIBLE AS EVIDENCE OF A ADMISSION OF MEDICAL LIABILITY -- EXHIBIT #13

Mr. MacMaster read the Section 1. of LC 5007W (EXHIBIT #13) and said it is a simple bill.

Pat Melby, MMA, proposed amendments (EXHIBIT #14), even though Mr. MacMaster had written the bill exactly as proposed to him by the MMA. Mr. Melby explained that when he

referred Mr. MacMaster to LC 1000 from the 2003 Legislature he did not realize that the bill, which was intended to be a bill allowing apology without admissibility, didn't contain the word "apology". The proposed amendments clarify that and includes the word "apology". Mr. Melby explained the rationale for the other amendments, saying that many times the apologies are made to a friend of the family, rather than the injured person, or the family of the injured person. The MMA would like to include "or a friend of the family" in the bill as well and would go a long way towards averting some potential claims from the courts and the MMLP. Mr. Melby said the MMA urges adoption of these amendments and the bill.

Larry Riley, UMIA, strongly supported amendments 3 and 6 by Mr. Melby and the MMA. Healthcare providers often want to express their sympathy or compassion to the family and friends of the patient, but are very leery of doing that for fear it will be used against them. This will give the healthcare provider an avenue to express their feelings and quite possibly, prevent hard feelings or misunderstandings between the family and the healthcare provider. This bill will be good for patients, healthcare providers, and the State of Montana.

Al Smith, MTLA, stated support for LC 5007W, if some of the amendments were adopted. He pointed out that the University of Michigan's Ann Arbor teaching hospital has adopted this policy, although it is not in statute. The hospital has found that even without being protected statutorily, the incidences of malpractice claims have decreased. People just want to talk, in many cases.

Mr. Smith said the MTLA would like LC 5007W to be limited solely to medical malpractice cases and would like to make it clear that this bill shouldn't be used as a shield to give immunity to a healthcare provider who did something wrong.

Mona Jamison, TDC, spoke in strong support of LC 5007W and of the Melby/MMA amendments. She stated that it is unfortunate that medical malpractice litigation has taken the humanity away from doctors and their ability to express themselves. TDC believes this bill allows them to respond in a human way when the outcome isn't good. She has read research indicating that when a physician is allowed to interact at a human level with the patients with bad outcomes, there is actually less litigation and things can get resolved sooner.

Ms. Jamison opposed the proposed amendment from the MTLA regarding the co-mingling of an apology with an admission of guilt, stating that it would have a chilling effect on what the very purpose of the bill. The court will determine whether or not a statement is a statement of liability and admission versus a statement of apology.

Tom Ebzery, St. Vincent Healthcare, said the hospitals and doctors he represents have a concern regarding LC 5007W. There is support for LC 5007W but not for the amendments proposed by Mr. Smith and the MTLA. They blur the intent of the bill and would create such a fine line that the doctor would likely choose not to say anything, which would defeat the purpose of the bill.

Mr. Smith said he had prepared an amendment but was not proposing that they be adopted. The only amendment the MTLA was pursuing at this time was to restrict the scope of LC 5007W to medical malpractice cases.

SEN. COBB moved to adopt LC 5007W.

REP. GOLIE proposed amendments (EXHIBIT #15) to LC 5007W which would limit it to medical malpractice cases only and would delete the definition of "accident" as it applies to Section 1 and **moved that the amendments be adopted.**

SEN. GRIMES asked what the implication is of deleting the definition of "accident" as it relates to medical malpractice and asked, in doing so, if any of the important concepts of the bill would be affected.

Mr. MacMaster said as the bill is written, it is not limited to medical malpractice. It is however, limited to accidents. The limitation is for any accident in any kind of context, not just medical malpractice. If the bill is going to be limited to medical malpractice, which is what REP. GOLIE's amendment does on line 16, then the reference to the word "accident" on line 14 must be removed.

SEN. SHEA opposed limiting LC 5007W to medical malpractice claims only, stating that it was the right thing to do and should be an option for all cases. REP. GOLIE said his rationale for limiting the bill to medical malpractice was because it relates to the reason for SJR 32 was passed and established. SEN. SHEA said there have been exceptions to that.

REP. GOLIE's motion to approve amendments to LC 5007W to limit it just to medical malpractice cases passed on a 6-2 vote, with SEN. SHEA and REP. BROWN voting no (Attachment #15).

SEN. COBB asked Mr. Riley for his opinion on the Melby/MMA amendments (EXHIBIT #14). Mr. Riley thought the amendments were necessary in order to make the definition fairly broad and allow some latitude. SEN. COBB asked Mr. Riley to clarify that even though the bill will widen the latitude, it will still be up to a court to decide to take part of the statement and make it admissible. Mr. Riley said that was correct.

REP. BROWN moved to adopt the MMA/ Melby amendments (EXHIBIT #14) to LC 5007W.

SEN. CROMLEY pointed out that the fifth amendment was not grammatically correct and that (line 12, Page 1), "A" should be stricken and that "statements" should read "Statements". REP. GOLIE said staff would make the amendment grammatically correct, if passed. He asked Mr. MacMaster, since the bill had already been amended (EXHIBIT #15), if the Melby/MMA amendments (EXHIBIT #14) would change the intent of the bill. Mr. MacMaster said the amendments would not change the intent of the bill and agreed with the stakeholders that the amendments would only broaden the bill, in terms of what actions, statements, and gestures would be covered.

REP. BROWN's motion to adopt the Melby/MMA amendments passed unanimously (Attachment #16).

SEN. COBB moved to adopt LC 5007W, as amended. The motion passed unanimously (Attachment #17).

**LC 5008W - STATUTORILY ESTABLISH QUALIFICATIONS FOR MEDICAL MALPRACTICE
EXPERT WITNESSES -- EXHIBIT #16**

Mr. MacMaster said the template used for this bill was from the MMA and it states the qualifications of an expert witness, particularly regarding expert witness testimony on medical negligence and on standards of care. He said he had cut down the template bill considerably and that the amendments that Mr. Melby intended to propose would restore much of the language he [MacMaster] deleted.

Pat Melby, MMA, said it was his intention to reinstate the original language and urged the Subcommittee to adopt the MMA proposed amendments (EXHIBIT #17), as well as the bill draft. He said this is a technical bill and from a provider's view point, must be worded the way it is to meet those technical requirements.

Tom Ebzery, St. Vincent Healthcare, said REP. BROWN's bill from the 2003 Legislative Session (HB 309) was largely the result of a number of doctors who were having serious issues. The bill was killed because it didn't come out the way it was intended and didn't address the problem. These amendments would accomplish what was intended in 2003. Mr. Ebzery urged that the amendments be adopted, as well as the bill draft.

Al Smith, MTLA, proposed amendments also (EXHIBIT #18) and stated that the position of the MTLA was that LC 5008W is unnecessary because the courts provide this function already, as far as making sure that expert witnesses are qualified. MTLA would support the original draft of the bill, if the MTLA amendments are adopted. Mr. Smith then explained the amendments, as written in EXHIBIT #18.

SEN. COBB moved to approve LC 5008W.

REP. GOLIE moved to adopt the Smith/MTLA amendments (EXHIBIT #18) to LC 5008 W.

SEN. GRIMES asked, regarding the second amendment in EXHIBIT #18, what the rationale was for changing the bill to read from "diagnosis, and" to "diagnosis, or".

Larry Riley, UMIA, said if LC 5008W is going to be as detailed as it is, then UMIA would like all four issues in a claim included in the bill text, not just the first two. The four issues of a claim are:

- standard of care - did the physician do what was reasonable under the circumstances - (included in LC 5008W);
- negligence - was the standard of care breached (included in LC 5008W);
- if so, did that cause the injury the plaintiff is claiming (not included in LC 5008W); and
- if the breach in the standard of care was the cause of the injury, did it cause the damages being talked about (not included in LC 5008W).

If the wish it that this bill proposal be totally complete on this, issues relating to negligence, standard of care, AND causation and damages must be included; because causation can be a very important factor in determining damages.

Mr. Smith disagreed with including causation and damages and said the bill proposal was better without them.

Mr. Melby said he thought the changes would have little effect on the bill proposal. In drafting the bill, the drafters incorporated the language from the United States Senate bill and didn't think the language would present a problem. Mr. Melby suggested that if there is an issue with language, it could be addressed during the legislative session.

Mr. MacMaster commented that the Smith/MTLA amendments clarified the intent of the bill.

SEN. GRIMES said, "for the record, I would like to have the word 'substantial' or 'comprehensive', or something preceding this list. I think what we are getting at here is we want to have a thorough, comprehensive knowledge of the subject matter and that's probably why we used the word and...so just so we have it on the record, as this goes through, that would be a concern of mine, that would just ensure that we show that by competent evidence that whoever is the expert witness is thorough or comprehensive, or otherwise qualified".

SEN. CROMLEY pointed out that on line 1 of page 2 of LC 5008W. the language does say "thoroughly familiar with the standards of care".

SEN. GRIMES asked if REP. GOLIE was amending his motion to include cause of injury and cause of damages. REP. GOLIE said he was not.

The motion to approve the Smith amendment (EXHIBIT #18) passed 7-1, with SEN. GRIMES voting no (Attachment #18).

SEN. SHEA moved to approve LC 5008W, as amended, for drafting.

REP. BROWN moved to approve the proposed amendments by the MMA/Mr. Melby (EXHIBIT #17).

Mr. MacMaster said several of the Melby/MMA amendments, particularly 1 and 5, would not work with LC 5008W and asked the permission of the Subcommittee to work with Mr. Melby to make the necessary modifications.

REP. BROWN's motion to adopt the MMA/Melby amendments (EXHIBIT #17) passed on a 5-3 vote, with SEN. CROMLEY, REP. GALVIN-HALCRO, and REP. GOLIE voting no (Attachment #19).

Dave Bohyer, Research Director, LSD, said as a matter of procedure, it is within the purview of the Committee to direct staff to clean up grammar, spelling, and punctuation and improve clarity pursuant to the guidelines established in the bill drafting manual, which the staff is required to follow.

REP. GOLIE asked Mr. MacMaster if the changes would alter the intent of the bill in any way or if the changes would be just grammatical in nature. Mr. MacMaster said the changes would be grammatical and that this type of cleanup work is something done regularly for bill drafts. REP. GOLIE said, without objection of the Subcommittee members, Mr. MacMaster would be allowed to correct the bill.

SEN. SHEA's motion to approve LC 5008W, as amended, for drafting passed on a 5-3 vote, with SEN. CROMLEY, REP. GALVIN-HALCRO, and REP. GOLIE, voting no (Attachment # 20).

LC 5009W - ESTABLISH A JOINT UNDERWRITING ASSOCIATION CONSISTING OF ALL MEDICAL MALPRACTICE PROVIDERS IN THE STATE -- EXHIBIT #19

Mr. MacMaster said LC 5009W would reenact former Chapter 8 of Title 33, MCA, (SB 437, 1977 regular Legislative Session) which went into effect in 1977 and was sunsetted in 1979. He explained that there was not an actual bill draft available at this time and that the Subcommittee, instead, had a copy of sunsetted Chapter 8 of Title 33, MCA, to use as a reference, with some changes penciled in by staff. If the conceptual bill is approved by both the SJR 32 Subcommittee and the Legislative Council, a formal bill draft will be prepared for introduction at the 2005 Legislature. Reviving this bill was recommended by Brian Zins, MMLP.

Mr. MacMaster explained that the bill would establish a joint underwriting association consisting of all medical malpractice insurers in the state. If the Commissioner of Insurance determines that medical malpractice insurance is not available in the voluntary market, the association becomes the exclusive entity through which the insurance may be provided. If the Commissioner later determines that med mal insurance again becomes available in the voluntary market, the association must stop providing insurance.

Pat Melby, MMA, spoke in support of LC 5009W and said while he hopes it never has to be used, it would provide a backup system. Mr. Melby said he would prefer that the bill draft for the 2005 Session not contain a sunset provision, as the 1977 version did.

REP. GOLIE asked why this bill was not brought back after the sunset. Brian Zins, MMLP, said the insurance climate at that time (1979) in Montana made this bill unnecessary. REP. GOLIE asked if he supported the bill with no sunset on it. Mr. Zins said he did.

Tom Ebzery, St. Vincent Healthcare, Billings, said he conceptually supports LC 5009W because it could prevent a special legislative session in the event of a mass exodus of insurers from the state. REP. GOLIE asked if Mr. Ebzery would support a sunset clause on the bill. Mr. Ebzery said he would not support a sunset clause.

John Flink, MHA, said the MHA also supported LC 5009W and having something like this as a backup would be very important.

Mona Jamison, TDC, said she was waiting for a full analysis from the TDC on this issue and could not support or oppose the bill proposal at this time. If LC 5009W includes only medical malpractice insurers, the effect of this bill will be that the two remaining insurers in the state (TDC and UMIA) would have to step up and provide the additional insurance. This could result in scaring other insurers away from doing business in Montana.

SEN. GRIMES thought LC 5009W gave a lot of control to the Insurance Commissioner under 33-8-103, MCA. He said he would like to add some type of safeguards or trigger mechanisms in the bill so that it will be known if its just a small portion of a specialty that can't find insurance coverage.

Mr. Melby thought it would be to the benefit of the State and should be public policy that healthcare providers be insured, in order to keep them in Montana and practicing medicine.

SEN. GRIMES asked if it was decided that a small portion of a specialty would have to be covered by a joint underwriting association, would the assessments be against those in the specialty or against all physicians. Mr. Melby said the cost would be spread over the insurers and would include both medical malpractice and casualty insurers.

SEN. GRIMES thought LC 5009W would provide a good safety net for the whole medical system but that it would have to be addressed very cautiously by the next Legislature to figure out some of the lingering questions, as they apply to medical malpractice.

SEN. GRIMES moved to approve LC 5009W as a conceptual bill.

SEN. CROMLEY said he would support the bill but asked for clarification on if the conceptual bill would or would not include a sunset provision. SEN. GRIMES said his motion did not include a sunset provision.

REP. GOLIE said since LC 5009W at this point is a conceptual bill, would SEN. GRIMES' motion have to be a motion to draft LC 5009 exactly as the former statute was written or if changes could be made. Mr. Bohyer said Mr. MacMaster had simply provided copies of the former statute and the Subcommittee could make changes. If a termination date is not included as part of the official draft, as it was in the former statute, some changes will have to be made.

SEN. GRIMES withdrew his original motion to approve a conceptual bill draft of LC 5009W and made a new motion to approve LC 5009W with a termination date and to also include the changes penciled by Mr. MacMaster.

REP. BROWN asked what the termination date in the bill draft would be. SEN. GRIMES said the termination date would remain the same as in the 1977 bill. Changes could be made later if needed. Mr. MacMaster said he couldn't recall what the original termination date was. SEN. GRIMES suggested having a four-year termination date and asked if the Subcommittee was comfortable with a four-year termination date.

REP. GOLIE said he did not want a termination date and asked if the Subcommittee members agreed. They did.

SEN. GRIMES withdrew his second motion to approve LC 5009W with a termination date and reinstated his original motion to approve drafting of LC 5009W without a termination date, with direction to Mr. MacMaster to change the introductory language. The motion passed unanimously (Attachment #21).

**LC 5000W - CREATE THE HEALTH CARE LIABILITY AND INJURED PATIENTS
COMPENSATION ACT (MONTANA VERSION OF THE WISCONSIN ACT OF THE SAME
NAME -- EXHIBIT #20**

Dave Bohyer said LC 5000W is an attempt to convert a Wisconsin law into a workable version for Montana. He said this law has been in effect in Wisconsin for approximately 30 years. Mr.

Bohyer explained that there are several parts to the bill and that these parts break down further into categories. One of the categories is the insurance plan that is set up. The plan is basically a reinsurance plan that insures healthcare providers for liability in excess of a certain amount of money. In Wisconsin, it is \$1 million per occurrence or \$3 million for all occurrences in a year. The Subcommittee asked to reduce that amount to \$750,000 per occurrence in Montana and to leave the \$3 million per year as is. This insurance plan is to be created by the Insurance Commissioner. He or she is statutorily directed to create the plan and is given significant authority on the components of the plan and how it will work.

Mr. Bohyer reviewed and explained each section of LC 5000W (EXHIBIT #20) for the Subcommittee.

Committee Discussion & Questions

SEN. GRIMES asked if the Peer Review Board in the Montana version of the bill would be similar to the Wisconsin law. Mr. Bohyer said the design of the Montana Board was identical to the Wisconsin Board. SEN GRIMES asked if the attorney fee limitation was also identical, including the court waiver for exceptional circumstances. Mr. Bohyer said yes. SEN GRIMES asked if the rationale for changing the cap on noneconomic damages from \$250,000 to \$350,000 was due to the consumer price index. Mr. Bohyer said the Wisconsin law sets the cap at \$250,000 and then requires that the \$250,000 be adjusted every year using the consumer price index. Mr. Bohyer explained that \$350,000 is what the cap in Wisconsin would currently be, using the adjustment formula.

Stakeholder Comments & Questions

Mona Jamison, stated that the TDC has serious objections to LC 5000W because:

- the caps are excessive and unacceptable;
- it is inequitable because the old cap is still in effect for some and because some healthcare workers were not included, such as physical therapists or physician assistants;
- it is not a true "no fault" system, as originally thought;
- it would create a new bureaucracy;
- it has inadequate rule-making safeguards;
- it will incite lawsuits; and
- it is the antithesis of what the SJR 32 Study set out to accomplish and would make the situation worse, not better.

Tom Ebzery, St. Vincent Healthcare, Billings, thanked Mr. Bohyer for his extensive research and work regarding the Wisconsin bill and others, and said even though the bill needs to be fine-tuned to suit Montana's needs, it is a good starting point. Mr. Ebzery said he opposed changing the amount of the cap on noneconomic damages and attorney fees limitations; and is concerned about what healthcare providers would be included and what providers would not. He said a key point is the excess compensation above a certain limit and said he is not convinced of the need for a Peer Review Council because Montana already has a good system in place.

Pat Melby, MMA, stated that the MMA is opposed to LC 5000W because:

- with so few judgments in Montana over \$750,000, there is no need for it;
- even with increased coverage, premiums will not be significantly affected;
- it requires most doctors to purchase even more coverage, and more than they need in most cases;
- it transfers the risk from high-risk specialties to low-risk specialties and lets the low-risk specialties pay the premiums for the high-risk specialties;
- of the concern that it creates a second "deep pocket" and may result in even larger judgments and increased premiums; and
- MMA is opposed to changes in the increase in the cap on noneconomic damages.

SEN. GRIMES asked what Wisconsin doctors pay for their coverage. Mr. Bohyer said it depends on the type of practice, the complexity and likelihood of either negligence or bad outcomes, and varies for low-risk to much higher premiums for those with higher-risk practices. Several factors are applied to the different classes of practices and this is what determines the cost of the premiums a specific doctor will pay.

SEN. GRIMES asked Mr. Melby to speak to the constitutionality of the cap on attorney fees. Mr. Melby said it would depend a lot on the complexion of the Montana Supreme Court. Montana has guidelines and caps on attorney fees in the Workers' Compensation Act already and a rational basis would have to be established for doing this. Mr. Melby said there were two important points that he wished to bring attention to:

- 1) It must be determined that there really are physicians who cannot find insurance coverage over \$1 million.
- 2) It must be determine what that premium is going to cost them, as opposed to the Wisconsin plan.

Mr. Melby said he had serious doubts that there is a problem that LC 5000W would remedy. Some physicians are already paying tremendous amounts for their malpractice insurance and under the Wisconsin law, they will pay even more. It must be determined what the additional insurance costs will be and if insurance is available before going forward with this bill.

John Flink, MHA, added several points, saying the MHA has not taken a position on LC 5000 W. The basic question the MHA has is would implementing this proposal result in lower premiums for hospitals. In the case of MHA, the hospitals have \$1 million of coverage, the Commissioner requires \$1 million, so a \$750,000 threshold will not be meaningful. As Mr. Ebzery and Mr. Melby have already testified, markets are going to raise the cost of medical liability insurance. The second point is, is that this is such a massive undertaking that it probably does deserve more time than today's session.

Jani McCall, Deaconess Billings Clinic, Billings, submitted a letter from the Clinic (EXHIBIT #21) which listed the proposed bills the Clinic will support, as well as two bill draft proposals it will not support: LC 5000W and LC 5006W. Regarding LC 5000W, the Clinic thinks it is too massive to move forward so quickly.

Al Smith, MTLA, said the Wisconsin model does two things that will benefit healthcare providers without injuring the rights of injured patients: it will lower and stabilize premiums and it will ensure the availability of insurance. Mr. Smith provided updated numbers from Wisconsin and said premium costs for Class 4 physicians went down by \$8,700 in 2002-2003 and that premiums have decreased for the last four years, indicating that the law does work as intended.

Mr. Smith disagreed with Mr. Melby's earlier comparison of the Wisconsin law and the Montana Workers' Compensation system and whether the Wisconsin law would withstand a challenge on the grounds of constitutionality. Montana's Workers' Compensation Act is specifically provided for in the Constitution. When the "hard" market came, Wisconsin's rates were going down and their doctors didn't have any problem with their insurance because the state insurance program was in place.

Mona Jamison, TDC, said she has a May 7, 2004, letter from a law professor at Marquette University in Wisconsin which states that the cap for noneconomic damages is now at \$423,000. Also, in listening to Mr. Smith's testimony that rates have gone down in two or three of the classifications, just looking at rates standing alone doesn't convey enough information to make that assumption.

Larry Riley, UMIA, said he did not have enough information to make a decision on whether the Wisconsin bill would be good, bad, or indifferent for the State of Montana. Mr. Riley suggested that Montana contact people in Wisconsin from the various perspectives: attorneys, healthcare providers, and legislators; to find out why it was started, how it has worked, and if it has worked well. Once that is done, Montana would have a better idea of if it should proceed with such an undertaking.

SEN. COBB moved to adopt LC 5000W.

REP. GOLIE said the Subcommittee could clarify and make this legislation much better than it is with an amendment he proposed. **REP. GOLIE moved to adopt his amendment (text contained in EXHIBIT #22) to LC 5000W.**

SEN. GRIMES said before the Subcommittee went to the effort of amending LC 5000W, it would behoove the members to determine what the support level is for taking up all of the amendments. He said he was uncertain that LC 5000W has the necessary support. **SEN. GRIMES moved to table LC 5000W.**

SEN. COBB said he would agree to indefinitely postpone so the motion could be debated. **SEN. GRIMES moved to indefinitely postpone LC 5000W.**

REP. GOLIE said he would accept the motion but he thought there was more than enough support for the bill proposal to bring it forward. **SEN. GRIMES' motion to indefinitely postpone LC 5000W failed on a 6-2 vote, with SEN. GRIMES and REP. ROBERTS voting to postpone (Attachment #22).**

REP. GOLIE explained that his amendment (EXHIBIT #22) would delete the limitation of attorney fees, reduce the \$350,000 cap on noneconomic damages to \$250,000, and allow no inflation factor to the cap.

SEN. GRIMES asked for clarification or confirmation that REP. GOLIE's amendment would be striking sections 38, 39, along with section 11; because they refer to information in section 11. Mr. Bohyer said there would be a number of changes that would have to be made in the bill if the amendment is adopted. Language will have to be taken out, in addition to changing the numbers.

REP. BROWN moved to segregate the portion of LC 5000W regarding noneconomic damages on the cap reduction back to \$250,000 from the attorney fee discussion.

REP. GOLIE said the amendment, in his opinion, covered attorney fees, and would not allow segregation.

SEN. GRIMES said he was becoming more convinced that the reason that Wisconsin does not have a problem is because not only because does Wisconsin allow advance payments and caps, but it also has a limit on attorney fees. If those things are taken out of the bill, it has no redeeming value whatsoever. He said he strongly opposed the amendment.

REP. GOLIES' motion to amend (EXHIBIT #22) LC 5000W failed on a 4-4 vote, with SEN. GRIMES, SEN. SHEA, REP. BROWN, and REP. ROBERTS voting no (Attachment #23).

SEN. GRIMES moved to establish the cap on noneconomic damages at \$250,000 without an inflationary adjustment and changing other sections, as discussed.

REP. GOLIE asked SEN. GRIMES to clarify that the amendment would put the noneconomic damages cap back down to \$250,000, with no adjustment for inflation allowed. SEN. GRIMES confirmed that that was the intention of his amendment.

SEN. GRIMES' motion passed on a 5-3 vote, with SEN. CROMLEY, SEN. SHEA, and REP. GALVIN-HALCRO voting no (Attachment #24).

REP. GOLIE proposed an amendment (full text contained in EXHIBIT #23) and explained his amendment would change the \$750,000 per occurrence annually to \$500,000 per occurrence annually.

SEN. SHEA asked what the impetus was for this amendment. REP. GOLIE said he had heard many times that there are not enough claims over \$750,000 in Montana to make this plan work. He thought his amendment would bring down primary insurance rates and make insurance more available, thus impacting claims made in Montana.

REP. BROWN said reducing the amount to \$500,000 could cause the cost of the secondary insurance to increase and result in costing the participants more in the long run.

SEN. SHEA asked who could advise the Subcommittee on this issue. Mr. Bohyer said an actuary would have to make the calculation to determine the impacts. REP. BROWN is correct that the primary insurance at \$500,000 would cost less than \$1 million, but then the reinsurance would cost an additional amount.

SEN. COBB thought the amendment was acceptable but that it would be beneficial to have more concrete numbers before the legislative session starts. Mr. Bohyer said Dr. Mark Crawshaw, the actuary who attended the January meeting on behalf of the MHA, said that he would be willing to look at some of the ideas that the Subcommittee came up with. Additionally, Wisconsin may have the ability to supplant the \$1 million threshold with a \$500,000 threshold and, for a minimal amount of effort, provide a ballpark figure of what the adjustments would be.

Mr. Bohyer said he could contact both Dr. Crawshaw and Wisconsin to find out if either could provide the needed information.

REP. GOLIE's amendment (EXHIBIT #23) to change the minimum amount of medical liability insurance from \$750,000 per occurrence annually to \$500,000 per occurrence annually passed on a 7-1 vote, with SEN. GRIMES voting no (Attachment #25).

SEN. COBB moved to amend LC 5000W (EXHIBIT #24). He explained that his proposed amendment would strike section 15, would eliminate the requirement that healthcare providers purchase any amount of primary insurance because everyone is covered for any amount over \$500,000 from the secondary insurance/risk pool. The healthcare provider can make the decision of whether or not he/she wants coverage and for what amount. **SEN. COBB's amendment passed unanimously (Attachment #25).**

SEN. GRIMES referred to Page 41, section 28, of LC 5000W (Actions against insurers, self-insurers, or providers - EXHIBIT #20), and said he wanted to make sure there is some protection regarding the powers afforded the Board of Governors. **SEN. GRIMES moved to strike section 28 in its entirety.** SEN. GRIMES said it was possible that the Board could be manipulated and this action would make certain that another level of review would be in place.

REP. GOLIE asked if the Wisconsin model contains this section. Mr. Bohyer said section 28 is directly from the Wisconsin model and that subsections (6) and (7) require the insurers to provide an adequate defense to the fund and requires them to act in good faith and in a fiduciary capacity, with respect to the fund. The Board doesn't have a relationship to the injured person or to the insured, but only with their relationship to the fund.

SEN. CROMLEY read from Section 22, Page 29 regarding the Board of Governors and commented that if that group was to determine that the physicians or the State has been in impaired by actions of the insurance companies, the State ought to have the right to seek redress for the State or the physicians. Striking section 28 would take away rights from the physicians and the State.

SEN. SHEA supported leaving section 28 in, saying if it is left in, it can be addressed.

SEN. GRIMES said taking a vote on the amendment and the discussion recorded in the minutes will draw attention to the matter and may accomplish the intention of his motion.

SEN. GRIMES' motion to strike section 28 failed on a 1-7 vote, with SEN. GRIMES voting yes (Attachment #26).

SEN. GRIMES moved to make attorney fee limitation a constitutional section of code, subject to constitutional referendum. Mr. Bohyer said the MCA and the Constitution cannot be amended in the same bill. A Constitution Amendment has to be voted on by the public. **SEN. GRIMES withdrew his motion.**

REP. GOLIE moved to amend LC 5000W by striking section 11 from the bill (limitation of attorney fees, Page 15, EXHIBIT #20). He said that he could not support LC 5000W with this

section in the bill proposal because it is arbitrary, limits access by any claimant or consumer, and could be unconstitutional.

SEN. SHEA asked if it has been found unconstitutional in Wisconsin. REP. GOLIE said it has not been found to be unconstitutional in Wisconsin.

SEN. GRIMES commented that the makeup of the Montana Supreme Court and Constitution is different than Wisconsin's. This bill creates something similar to the work comp system, so one would think that it would withstand constitutional muster; but based on what Mr. Smith said, it may not.

REP. GOLIE asked Mr. Smith to explain this section of the bill and why it could be found unconstitutional. Mr. Smith said Wisconsin's constitution is different than Montana's and that alone would likely be the basis for the challenge under the Declaration of Fundamental Rights (Article 2 of the Montana Constitution). That same article also addressed the Workers' Compensation system. It could be argued that the attorney fee limitation would limit a person's ability to hire an attorney and with those limitations on the fees, fewer patients will be able to get attorneys to take their cases on, and therefore, affect a patient's access to the court. Attorney's fees in medical malpractice cases come out of the award for the claim. There are provisions in Montana that allow a person to contest their attorney fees when they think the fees are unreasonable.

REP. GALVIN-HALCRO asked how the percentage an attorney receives from the plaintiff is determined. Mr. Smith said the attorney fee agreement would be reached prior to any action being taken in the case. Attorney fee agreements will generally include provisions about certain percentages in the event of settling out of court, a different percentage if it goes to trial, and an additional percentage if there is an appeal.. Those things are negotiated to a certain extent but most attorneys base their fees upon their experience. REP. GALVIN-HALCRO asked, if she sued a doctor for medical malpractice, if she would have to sue for a specific amount of money and would not be allowed to add attorney fees to that amount. Mr. Smith said that was true, that when the case goes to trial, the plaintiff has to prove their damages. The jury will make the determination of how much the plaintiff will get and nowhere in that calculation does the attorney's fee come into play.

SEN. SHEA asked Mr. Smith if he had seen abuse of that situation and commented that she has seen instances of abuse, on the attorney's part. Mr. Smith said he had personal knowledge of cases in which attorneys have taken advantage of a situation. It does happen but there is recourse. He said he has also seen the opposite situation, where an attorney has taken less than negotiated.

SEN. SHEA related a case involving Montana Resources in which the plaintiffs ended up with a pittance of the settlement amount. Mr. Smith said he had been contacted by several of the plaintiffs involved in that particular case and that he had provided names of attorneys who could help them remedy the situation. SEN. SHEA asked if attorneys self-regulate or keep an eye on each other. Mr. Smith said the State Bar Association has a lawyer disciplinary process and members of the public and attorneys can make complaints regarding an attorney's practices. The deterrent of legal action is a strong motivation to attorneys.

SEN. GRIMES opposed the amendment and said, with regard to section 11, that the section allows attorneys to be paid well, but doesn't allow them to reap the windfall either. If there are exceptions, the judges (line 11-13, Page 16, EXHIBIT 20) "can, showing of exceptional circumstances,.....waive those caps". Also, this doesn't apply if the attorney charges on a per hour basis.

REP. GOLIE restated his position that he thought section 11 would be found unconstitutional and asked the Subcommittee to support his amendment so there could be unanimous support for LC 5000W.

REP. GOLIE's motion to amend LC 5000W by striking section 11 (limiting attorney fees) failed on 4-4 vote, with SEN. GRIMES, SEN. SHEA, REP. BROWN, and REP. ROBERTS voting no (Attachment #27).

SEN. COBB moved to approve LC 5000W, as amended, for drafting. The motion passed 6-2, with SEN. GRIMES and REP. GOLIE voting no (Attachment #28).

REP. GOLIE authorized Mr. Bohyer to contact an actuary and/or Wisconsin officials regarding the possible impact of REP. GOLIE's previous amendment to LC 5000W, which changed the minimum amount of medical liability insurance from \$750,000 per occurrence annually to \$500,000 per occurrence. Mr. Bohyer said he would attempt to gather the information.

REP. BROWN asked to revisit to LC 5003W (EXHIBIT #7 - third party bad faith).

SEN. GRIMES asked Mr. Melby to comment on LC 5003W or other alternatives that may reduce the onerous nature of bad faith claims. Mr. Melby said the Subcommittee had advanced two bills to address the issue (advance payments and loss of chance) and that both would help resolve the bad faith issue. Mr. Melby said the third issue, the deduction of future expenses and consumption in a survival action, may not be a huge issue. MMA will likely seek to introduce a bill in the 2005 Legislature independently of this Subcommittee that substantially mitigates the problem of bad faith. From MMA's perspective, two legs of a three-legged stool are in place with the Subcommittee's recommendations so far that would, perhaps, remove the need for LC 5003W.

Larry Riley, UMIA, said, regarding the bad faith issue, that he would like to see clarification by having a statute that says a vote of the Panel in favor of the plaintiff does not establish bad faith. That would do what needs to be done in the medical malpractice area and it wouldn't interfere with insurance companies conducting their business.

SEN. GRIMES asked if a motion would be allowed to draft a bill addressing the issues Mr. Riley spoke of. REP. GOLIE said he would not be in favor of that because of previous action taken by the Subcommittee.

REP. BROWN asked if there would be an opportunity for him to present several bills that he would like to propose. REP. GOLIE said he would prefer not to open the meeting up for additional bills.

SEN. SHEA said concerns should be discussed with the Legislative Council so that the Council will know that the Subcommittee worked hard to review these issues and that it has remaining concerns about some of the bill draft proposals.

REP. GOLIE reminded the members that all of the draft legislation must be presented to the Legislative Council for its approval. He encouraged the Subcommittee members to attend the Legislative Council meeting, in order to support the Subcommittee's bill draft proposals.

REP. GOLIE thanked the Subcommittee members and the stakeholders for all of the effort and information provided at the meetings.

REP. GOLIE adjourned the meeting.

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